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88-542

No. 88-____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1988

Edward W. Jackson,
Petitioner,

v.

State of Maine,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

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QUESTION PRESENTED

1. May States interpose their common-law sovereign immunity as a defense against damage claims brought in state court under the Vocational Rehabilitation Act?

PARTIES

The petitioner in this Court is Edward W. Jackson. The respondent is the State of Maine. In the proceedings below petitioner also sought relief against Maine School Administrative District No. 9. The claim against the School District was dismissed on grounds unrelated to the issue which is the subject of this petition.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties.	ii
Table of Contents.	iii
Index of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statutes Involved.	3
Statement of the Case.	5
Reasons For Granting Writ	9
Conclusion	24
APPENDIX	

INDEX OF AUTHORITIES

Cases	Page
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	9,10,12, 16,18,22, 24
Edelman v. Jordan, 415 U.S. 651 (1974)	19
Employees v. Missouri Dep't of Public Health and Welfare, 411 U.S. 279 (1973).	17,19
Felder v. Casey, 139 Wis. 2d 614, 408 N.W.2d 19 (1987), reversed, 56 U.S. 4689 (June 24, 1988)	14,15
Hampton v. State of Michigan, 144 Mich. App. 792, 377 N.W.2d 920 (1985), leave to appeal denied, 429 Mich. 878 (1987), petition for cert. filed, 56 U.S. L.W. 3627 (Feb. 29, 1988) (No. 87-1445).	13
Hutto v. Finney, 437 U.S. 678 (1978)	18
Karchefske v. Dep't of Mental Health, 871 N.W.2d 876 (Mich.App.1985).	20

Kristensen v. Strinden, 343 N.W.2d 67 (N.D. 1983). . . . 21

Maine v. Thiboutot, 448 U.S. 1 (1980) 8,11,12, 18

Martinez v. California, 444 U.S. 277 (1980). 14

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) . . . 19

Skoblow v. Ameri-Manage, Inc., 514 So.2d 1077 (Fla. 1987), petition for cert. filed, 56 U.S.L.W. 3627 (Feb. 29, 1988) No. 87-1454) 13

Stone v. Powell, 428 U.S. 465 (1976) 15

Will v. Dept. of Civil Service, 428 Mich. 540, 410 N.W.2d 749 (1987) cert. granted, 56, U.S.L.W. 3718 (April (April 19, 1988) (No. 87-1207) 13

Other Authorities

Statutes:

Eleventh Amendment, United States Constitutuion . . . Passim

29 U.S.C. § 794. 7

42 U.S. § 2000d-7. 9

5 M.R.S.A. § 4572 7

29 M.R.S.A. § 530. 5

29 M.R.S.A. § 2013 5,6

Secondary Authorities

132 Cong. Rec. S 15104-05 (daily ed. Oct. 3, 1986) . . 22,24

Field, The Eleventh Amendment and Other Immunity Doctrines,126 U.Pa.L.Rev. 515 (1978) 19

Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations, 69 Cal.L.Rev. 189 (1981) . . 20

No. 88 _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

EDWARD W. JACKSON,

Petitioner,

v.

STATE OF MAINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

The petitioner, Edward N. Jackson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Maine entered in this proceeding on June 30, 1988.

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court is reported at 544 A.2d 291 (May, 1988), and is set out at pp. 1a - 42a of the Appendix.

JURISDICTION

The decision of the Maine Supreme Judicial Court was entered on June 30, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 794 of 29 U.S.C. provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, be excluded from any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 2000d-7 of 42 U.S.C. provides:

(a) General Provisions
(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date

The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

Statement of the Case

In August, 1985, Maine School Administrative District No. 9 (the District), hired petitioner as a school bus driver. During his employment interview, petitioner disclosed to the District that he was an insulin-dependent diabetic. As required by Maine law,[1] petitioner applied to the state Department of Motor Vehicles (DMV) to be examined for a bus driver's endorsement. The State Department of Educational and Cultural Services (DECS) received his application and notified the DMV that petitioner did not meet the minimum physical requirements for a school bus driver under the DECS Uniform School Bus

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[1] 29 M.R.S.A. § 530 (2)C) (Supp. 1987) and 29 M.R.S.A. § 2013(1)E) (Supp. 1987).

Standards 8081.6.[2] These standards required a driver to be free "from mental, nervous, organic or functional disease likely to interfere with safe driving," including diabetes. Based on DECS's action, petitioner was not permitted to take the school bus driver examination; the District then terminated him.

Petitioner initially filed an action for judicial review of the state agency's refusal to permit him to take the school bus driver examination in the Maine Superior Court for Kennebuc County.[3] In a separate action, he alleged, inter

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[2]29 M.R.S.A. § 2013(1)(C) provides that no person shall operate a school bus who does not meet all special physical, mental and moral requirements established by the Commissioner, DECS.

[3]This action was assigned Docket No. CV86-124.

alia, that the State had discriminated against him in violation of the Vocational Rehabilitation Act, 29 U.S.C. § 794, and sought compensatory and injunctive relief.[4] These actions were subsequently consolidated. Petitioner then amended his complaint to assert claims against both the State and the District under the Maine Human Rights Act, 5 M.R.S.A. §§ 4572 et seq.

The Superior Court decided liability on cross-motions for summary judgment, and held that the State had violated the Rehabilitation Act. After a trial on damages the court awarded attorney fees to petitioner, but declined to award damages for the Rehabilitation Act

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[4]This action, assigned Docket No. CV86-270, also alleged that the State and the District had violated petitioner's right to equal protection.

violation because of the State's sovereign immunity. The court also ordered that petitioner be reinstated.

Petitioner appealed the holding that the State's sovereign immunity precluded a damage award under the Rehabilitation Act. The State of Maine cross-appealed the Superior Court's finding of liability.[5] The Maine Supreme Judicial Court affirmed the Superior Court's fndings of liability. On the issue of damages, the Maine Supreme Judicial Court held as follows:

> "For reasons similar to those expressed in Thiboutot [v. State, 405 A.2d 230, 236-37 (Me. 1979), aff'd sub nom. Maine v. Thiboutot, 448 U.S. 1 (1980)], and still without conviction that this federal issue has been finally resolved, we conclude that the State may constitutionaly interpose its sovereign immunity in state court as a bar to an award of

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[5]Other claims not relevant to this petition were also appealed.

> damages under Section 504 of the Rehabilitation Act."

(App. at 37-38). The Maine Supreme Judicial Court also indicated that the Rehabilitation Act Amendments of 1986,[6] which were designed to overrule Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), did not abrogate the State's common law sovereign immunity in state courts. (App. at 39 n. 10). As a result, petitioner was deprived of any back pay or other compensation for the Section 504 violation.

Reasons For Granting the Writ

Certiorari should be granted to review the decision of the Maine Supreme Judicial Court because it involves the important issue of whether the

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[6]Rehabilitation Act Amendments of 1986, Pub.L.No. 99-506, § 1003, 100 Stat.1807, codified at 42 U.S.C. § 2000 d-7. The Amendments govern violations occurring after October 21, 1986.

Constitution permits states to assert state immunities in state court damage actions brought under federal civil rights statutes. In deciding that states are free to do so, the Maine Supreme Judicial Court has effectively eliminated any damage remedy in such actions brought in state courts. In addition, even as to statutes where Congress has expressly abrogated the states' Eleventh Amendment immunity, the Maine Supreme Judicial Court's decision disregards the state courts' obligation to enforce federal law and would permit states to frustrate federal remedial legislation. The decision is based upon a misreading of this Court's Eleventh Amendment decisions, the obligations imposed upon state courts by the Supremacy clause, this Court's decision in Atascadero and

the legislative history of the Vocational Rehabilitation Act.

In reaching its decision, the Maine Supreme Judicial Court applied its analysis of 42 U.S.C. § 1983 in Thiboutot to the Vocational Rehabilitation Act. In Thiboutot, the Maine Supreme Judicial Court held that

> "in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under 42 U.S.C. § 1983 to recover the amount of past AFDC under payments . . . ."

405 A.2d at 237. This holding was not considered by this Court in Maine v. Thiboutot, 448 U.S. 1 (1980). The Maine Supreme Judicial Court reasoned that this Court's Eleventh Amendment decisions stand for the principle that state law controlled the States' liability under federal civil rights statutes in state

court damage actions. The Maine Supreme Judicial Court's Thiboutot decision opened the door for states to assert their common-law immunity in state court damage actions brought to enforce other federal civil rights legislation, such as the Vocational Rehabilitation Act, even where the states are clearly encompassed within the class of persons subject to the Act. The Maine Supreme Judicial Court's decision, if uncorrected, would permit the States to frustrate federal remedial legislation enacted under section 5 of the Fourteenth Amendment.[7] The central assumption underlying this Court's Eleventh Amendment decisions - that applying

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[7] Atascadero State Hospital v. Scanlon, 473 U.S. 234, 245 n. 4 (1985) ("we first analyze § 504 in light of Congress' power under the Fourteenth Amendment to subject unconsenting States to federal court jurisdiction.")

special narrow rules of construction to determine state susceptibility to damage actions in federal court will not free the states from their legal obligations - is undermined. Civil rights plaintiffs, such as petitioner, are left without any damage remedy.[8]

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[8]This petition presents an issue that is related to that set forth in Will v. Dept. of Civil Service, 428 Mich. 540, 410 N.W.2d 749 (1987) cert. granted, 56 U.S.L.W. 3718 (April 19, 1988) (No. 87-1207). If the Court in Will holds that states are liable for damages in 42 U.S.C. § 1983 actions brought in state courts, then the essential underpinning of the Maine Supreme Judicial Court's holding will collapse. The issue in Will is also presented by other pending petitions: Hampton v. State of Michigan, 377 N.W.2d 920, 144 Mich. App. 792 (1985), leave to appeal denied 429 Mich. 878 (1987), petition for cert. filed, 56 U.S.L.W.3627 (Feb. 27, 1988) (No. 87-1445); Skoblow v. Ameri-Manage, Inc., 514 So.2d 1077 (Fla. 1987), petition for cert filed, 56 U.S.L.W., 3627 (Feb. 29, 1988) (No. 87-1454). An order vacating the Maine Supreme Judicial Court's decision for reconsideration in light of Will would then be appropriate.

The Maine Supreme Judicial Court's decision also conflicts with this Court's decisions which hold that state law immunities are preempted by federal civil rights statutes even when state courts possess concurrent jurisdiction over such actions. Just last term, in Felder v. Casey, 56 U.S.L.W. 4689, 4791-92 (1988), the Court observed:

> "that a state law that immunizes governmental conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, Martinez v. California, 444 U.S. 277, 284 (1980), which of course already provides certain immunities for state officials."

Martinez v. California, 444 U.S. 277, 284

(1980), teaches that the assertion of state law immunities in a federal statutory action runs afoul of the Supremacy Clause:

> "A construction of the federal statute which permitted a state immunity defense to have a controlling effect would transmute a basic guarantee into an illusory promise; and the Supremacy Clause of the Constitution insures that the proper construction may be enforced."

The Maine Supreme Judicial Court's decision cannot be reconciled with these basic principles and should be vacated and remanded in light of Felder. If state courts are to fulfill their proper role as forums for the enforcement of federal rights, Stone v. Powell, 428 U.S. 465, 493 n. 35 (1976), their decisions must be premised upon federal law. Absent a definitive pronouncement, state courts will be free to fashion differing

remedies for a state official's violation of the same federal civil rights statute, or worse yet, immunize the state official altogether, under that state's common law.

The Maine Supreme Judicial Court's decision also conflicts with this Court's decision in Atascadero. In Atascadero, the Court held that the Eleventh Amendment barred a federal court action under Section 504 for retroactive monetary damages. The majority, per Justice Powell, however, emphasized that its holding did not, as Justice Brennan's dissent suggested, mean that the States are "exemp[t] . . . from compliance with laws that bind every other legal actor in our nation." Id. at 249:

> "This claim wholly misconceives our federal system. As Justice Marshall has noted, "the issue is not the general immunity of the states from private suit . .

> . but merely the susceptibility of the states to suits before federal tribunals. Employees v. Missouri Dep't of Public Health and Welfare, 411 U.S. 279, 293-294 (1973) (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See Martin v. Hunter's Lessee, 1 Wheat. 304, 341-344 (1816). See also Stone v. Powell, 428 U.S. 465, 495, n. 35 (1976), and post, at _____, n. 8."

Id. at 239 n. 2. By embracing Justice Marshall's concurring opinion in Employees, the Court left no doubt that section 504 actions against state officials for compensatory relief could be brought in state court.

In Employees, Justice Marshall's opinion said as much regarding the Fair Labor Standards Act:

> "While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the state nonetheless

> have an independent constitutioal obligation to enforce these rights."

411 U.S. at 298-299.

Atascadero, then, is consistent with this Court's decisions which have assumed that a plaintiff could enforce federal law against states in state court actions. This Court's decision in Thiboutot upheld an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, noting:

> "No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only [t]he Judicial power of the United States."

448 U.S. at 9, n. 7. Justice White joined the majority opinion in Thiboutot, despite his contention in Hutto v. Finney, 437 U.S. 678, 704 (1978), that the Attorney's Fee Act did not authorize

such awards against a state in federal court. As recited above, in Employees, Justices Marshall and Stewart emphasized that the Eleventh Amendment did not preclude state court enforcement actions of the Fair Labor Standards Act. 411 U.S. at 298.[9] In Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 122 (1984), the majority observed that "under Edelman v. Jordan . . . a suit against state officials for retroactive monetary relief . . . based on federal law, must be brought in state court." The Maine Supreme Judicial Court's decision disregards these teachings. See also, Field, The Eleventh Amendment and Other Immunity Doctrines, 126 U.Pa.L.Rev. 515

[9]In Employees, the majority noted that the FLSA "arguably" authorized suits in state court, but did not decide the issue. 411 U.S. at 287.

(1978); Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Court for Constitutional Violations, 69 Cal.L.lRev. 189 (1981).

Other state courts have, like the Maine Supreme Judicial Court, misapplied and misread this Court's Eleventh Amendment decisions to allow states to interpose their common law immunity in state court to federally created claims for relief. See e.g., Karchefske v. Dep't of Mental Health, 371 N.W.2d 876, 878-81 (Mich.App.1985) (holding that the state is a person for purposes of § 1983 liability, but that it may assert traditional sovereign immunity as a defense in state courts: "we would expect the same clarity of Congressional intent to abrogate traditional sovereign

immunity as the United States Supreme Court demanded (and found lacking) in Quern, . . . with respect to Eleventh Amendment immunity."); Kristensen v. Strinden, 343 N.W.2d 67, 76-77 and n. 11 (N.D. 1983) (holding that states may assert traditional sovereign immunity as defense to § 1983 liability). As only the most specific expression of Congressional intent will satisfy the Eleventh Amendment's requirements, the importance of distinguishing between that inquiry and the broader one of state immunity to federal claims in state courts becomes vital. This widespread confusion should be corrected; there is no constitutional predicate for transforming Eleventh Amendment principles into a general principle of federal statutory construction whenever

state financial interests are implicated.

Finally, the Maine Supreme Judicial Court's decision is inconsistent with the legislative history of the Vocational Rehabilitation Act. In the Rehabilitation Amendments Act of 1986, Congress expressly abrogated the State's Eleventh Amendment immunity in §504 actions among others. The amendment further provided:

> "(2) In a suit against a State for a violation of a statute referred to in paragraph 1, remedies (including remedies both at law and in equity) are available for such violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State."

The amendments were intended to remove Atascadero's restrictions on federal court damage actions. 132 Cong.Rec. S 15104 (daily ed. October 3, 1986) (Sen.

Cranston). The Congressional sponsors correctly assumed that states were already liable in state court damage actions. As Senator Cranston explained:

> "As a result of the court's decision, a disabled individual who has suffered unfair discrimnation at the hands of a state agency has two choices - a suit in state court for damages or injunctive relief, or both, or federal suit for an injunction against individual state officials...the availability of a remedy for damages in state court is not adequate principally for three main reasons. First, state courts - because of a variety of factors including the greater likelihood of state judges being deferential to state officials and laws - are not as likely to be as sympathetic to aggrieved parties in interpreting federal statutes and applying them to state officials as are the federal courts. Second, state judges generally lack the familiarity with and the expertise in interpreting and applying federal laws that federal judges typically have. Third, state courts often have backlogs far greater than those

> in the federal courts in the same geographical areas."

Id. at S15105. (emphasis supplied). The Justice Department, speaking on behalf of the administration, similarly interpreted Atascadero, Id. at S15105-6.

Ironically, under the Maine Supreme Judicial Court's decision, a handicapped person may bring an action against a state in federal court for damages, but is precluded from doing so in state court. Under its rationale, state courts are no longer equal forums for the enforcement of federal rights.

Conclusion

For all the reasons stated, a writ of certiorari should be issued to review the decision of the Maine Supreme Judicial Court.

Respectfully submitted,

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APPENDIX

EDDIE W. JACKSON,

Petitioner,

v.

STATE OF MAINE, et al.,

Respondents.

No. Ken-87-263

Maine Supreme Judicial Court

Argued January 20, 1988

Decided June 30, 1988

Harold L. Lichten of Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, P.C., Boston, and Thomas S. Carey, Rumford, Maine, for petitioner, Jackson.

James E. Tierney, Atty. Gen., and James M. Bowie, Asst. Atty. Gen., for respondent State of Maine.

Philip E. Johnson and Lynne Van Note, of Pierce, Atwood, Scribner, Allen, Smith & Lancaster, Augusta, for respondent M.S.A.D. #9.

John E. Carnes, of Maine Human Rights Commission, Augusta, amicus curiae.

Before McKUSICK, C.J., NICHOLS, * ROBERTS, WATHEN, GLASSMAN, SCOLNIK and CLIFFORD, JJ.

ROBERTS, J.

The State of Maine, Department of Educational and Cultural Services (DECS) and Department of State, Motor Vehicle Division (DMV), appeal from the summary

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*Nichols, J., sat at oral argument and participated in the initial conference but retired before this opinion was adopted.

judgment of the Superior Court, Kennebec County, in favor of Eddie W. Jackson's claim of discrimination in violation of the federal equal protection clause, actionable pursuant to 42 USC § 1983 (1981); the Rehabilitation Act of 1973, § 504, 29 USC § 794 (1985); and the public accommodation provisions of the Maine Human Rights Act, 5 M.R.S.A. § 4591-94B (1979 & Pamph. 1987). Defendant Maine School Administrative District No. 9 (MSAD No. 9) appeals from the summary judgment in favor of Jackson's claim that the district violated the employment discrimination provisions of the Maine Human Rights Act, 5 M.R.S.A. § 4572 (1979) and the denial of its cross-claim for contribution from the State. Jackson cross-appeals from the court's ruling

that the State is not an employer for the purposes of liability pursuant to the employment discrimination provisions of the Maine Human Rights Act, 5 M.R.S.A. §§ 4571-75 (1979 & Pamph. 1987). We vacate the judgment against MSAD No. 9 and consequently need not address the district's cross-claim. We also vacate the grant of damages and injunctive relief against the State. We affirm the award of attorney fees.

I. Facts

Jackson applied for a position with MSAD No. 9 as a school bus driver and custodian for a school in Weld. During his job interview, Jackson told the Director of Transportation for the district that he is an insulin-dependent

diabetic. The director informed him that his controlled diabetes would not present a problem.

The district hired Jackson and Jackson began his custodial duties and the necessary driver training. As required by 29 M.R.S.A. § 530(2)(C) (Supp. 1987) and 29 M.R.S.A.

§ 2013(1)(E)(Supp. 1987), [1] Jackson applied to the DMV, to take the examination necesary to receive a bus

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[1]Section 530, subsection 2(C) provides, in relevant part,

School buses . . shall not be given a separate class, but their use shall be provided for by special endorsement on their operator's license. This endorsement shall be made only after the applicant has successfully passed the examination designed for the specific vehicle . . . .

Section 2013(1)(E) provides,

No person shall operate a school bus or a private school activity bus in the actual conveyance of school children until he shall have complied with the following requirements:

E. Must pass an examination as the Secretary of State shall prescribe to determine his ability to operate the specific vehicle which will be driven as a school bus or any comparable type vehicle.

driver's endorsement. The application materials, which indicated that Jackson is an insulin-dependent diabetic, were forwarded to the DECS.

The DECS notified the DMV that Jackson could not be approved as a school bus driver because of DECS Uniform School Bus Standards § 081.6, which required that school bus drivers meet certain minimum physical requirements, including "freedom from mental, nervous, organic or functional disease likely to interfere with safe driving, such as epilepsy, paralysis, insanity, diabetes, abnormal blood pressure, and heart ailments." [2]

The DECS regulation thus prevented the DMV from administering the

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[2] 29 M.R.S.A. § 2013(1)(C) provides that no person shall operate a school bus who does not meet all special physical, mental and moral requirements established by the Commissioner, DECS.

examination to Jackson. Without the examination and endorsement, Jackson was not qualified to drive a school bus. Consequently, the district discharged Jackson. Jackson refused the district's offer of a full-time custodial position in Farmington, twenty-one miles from his home in Weld.

II. Procedure

Jackson appealed the denial of his application to take the school bus driver's examination. After an evidentiary hearing, the hearing examiner upheld the decision denying Jackson's application. In Docket No. CV 86-124, Jackson filed a timely petition for judicial review of the examiner's decision in the Superior Court pursuant

to M.R. Civ. P. 80C. Jackson alleged that the decision denying his application was arbitrary and capricious, and that the statute and regulations on which the Secretary of State based the denial illegally discriminate against diabetics as a class.

In Docket No. CV 86-270, Jackson filed a separate complaint in Superior Court for compensatory and injunctive relief. He named as defendants MSAD No. 9 and the State of Maine, through its two state agencies, DECS and DMV. In his complaint, Jackson alleged that both the State and the district violated his rights to equal protection and procedural

due process,[3] and that the State had illegally discriminated against him in violation of the Rehabilitation Act. He sought compensatory and injunctive relief.

The court granted Jackson's motion to consolidate the Rule 80C petition and the plenary claim for statutory violations. Jackson was permitted to amend his complaint to include a claim against the State and the district for violation of the Maine Human Rights

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[3]The Superior Court did not rule on Jackson's claim of denial of procedural due process and Jackson raises no issue in that regard on appeal.

Act.[4]

The parties filed cross-motions for summary judgment on the liability issues. The court ruled that the State's denial of Jackson's application violated Jackson's right to equal protection, the Rehabilitation Act, and the public accommodations provision of the Maine Human Rights Act, 5 M.R.S.A. § 4591. The court found that the State was not Jackson's employer for purposes of the employment discrimination provisions of the Maine Human Rights Act, 5 M.R.S.A. §

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[4]Jackson had previously filed a complaint with the Maine Human Rights Commission. The Commission found reasonable grounds to believe that unlawful discrimination based on physical handicap had occurred. 5 M.R.S.A. § 4612. The Commission appears in the Law Court as amicus curiae.

4572. However, the court determined that the district, by discharging Jackson, had committed employment discrimination in violation of 5 M.R.S.A. § 4572.

After a trial on the issue of remedy, the court assessed damages, including an award for both past and future wage loss and attorney fees against the State. The court ordered the district to pay damages in the event that sovereign immunity barred the award against the State. The court ordered the State to administer the examination to Jackson, and the district to offer him the next available comparable job, providing he met all other conditions of employment.

On appeal, the State challenges the court's findings of liability for violation of the equal protection clause, the Rehabilitation Act, and the public accommodations provision of the Maine Human Rights Act. The district challenges the court's finding of liability for violation of the employment discrimination provisions of the Maine Human Rights Act and the denial of its cross-claim for contribution from the State. On his cross-appeal, Jackson challenges the court's determination that the State was not Jackson's employer for the purposes of the Maine Human Rights Act.

III.

Since July 1, 1976, state agencies have been prohibited by the Code of Fair

Practices and Affirmative Action (Fair Practice Code), 5 M.R.S.A. §§ 781-791 (1979 & Supp. 1987), from discriminating because of physical handicap "while providing any function or service to the public [or] in enforcing any regulation . . . ." Id. at § 784(1). Under the Fair Practice Code the proscription against discriminatory action by state agencies because of a physical handicap is much broader in scope than the Maine Human Rights Act, 5 M.R.S.A. §§ 4551-4660 (1979 & Pamph. 1987). The latter act's proscription is limited to discrimination in employment, in housing, in access to public accommodations and, since 1987, in education. Because of the breadth of the Fair Practice Code, DECS regulation

section 081.6, as enforced by DMV and at issue in this litigation, would be held invalid regardless of our resolution of the other issues raised on appeal. The regulation, which prohibits the operation of school buses by diabetics regardless of the ability of the individual with diabetes to operate safely school buses on Maine highways, effects exactly the kind of discrimination the Legislature sought to prohibit under the Code. See Maine Human Rights Comm'n v. Canadian Pacific Limited, 458 A.2d 1225 (Me. 1983) (interpreting Maine Human Rights Act prohibition against discrimination in employment based on physical handicap). Indeed, the court was informed prior to hearing on the summary judgment motions that DECS no longer precludes all

insulin-dependent diabetics from operating school buses.

Our analysis suggests, therefore, that had Jackson sought prompt review of the DMV denial of his application to take the bus driver's license examnation, by relying on section 784(1), he could have obtained a prompt reversal of the DMV decision. Instead, Jackson commenced the plenary action in CV 86-270 against the State and MSAD No. 9, asking the court to consolidate the actions. The court's order of February 2, 1987, expressly declines to address on the merits Jackson's 80C action in CV 86-124. For all that appears of record, CV 86-124 is still pending in the Superior Court, although MSAD No. 9 and Jackson advise us

that Jackson now drives a school bus for MSAD No. 9.

IV.

Against this background, we first address the court's grant of summary judgment in favor of Jackson on his section 1983 claim based on denial of equal protection. The court found no rational basis for the regulation pursuant to which the State denied Jackson's application.

In order to prove that a statute or regulation violates equal protection by virtue of an illegal classification, the party challenging the classification must show "by clear and irrefutable evidence its arbitrariness and irrationally discriminatory nature."

Bealieu v. City of Lewiston, 440 A.2d 334, 338 (Me. 1982). The law or regulation will be upheld if any "conceivable state of facts" justifies the distinction. Id. (emphasis retained).

The State did not challenge Jackson's evidence that Jackson himself is physically capable of operating a school bus safely. The State contended, however, that some diabetics, as bus drivers, could present a risk to passengers. The State presented the Superior Court with medical literature that reflects the concern, embodied in the DECS regulation, for possible risks presented by diabetic drivers. The State clearly has an overwhelming interest in

protecting the children transported to school on public school buses. It attempted to accomplish this goal in party by eliminating those persons who might present some risk. Available medical information supported placing diabetics in a potential risk category. The fact that the regulation was over-inclusive, eliminating physically capable diabetics as well as diabetics unsuited for the job, does not establish an equal protection violation. See Beaulieu, 440 A.2d at 339 (analyzing Dandridge v. Williams, 397 U.S. 471, 486-87 (1970)). Jackson was not entitled to a determination that the classification has no rational basis.

V.

The Superior Court found the State to be in violation of the Maine Human Rights Act.[5] We conclude that the court erred in its decision that the ability to obtain a license and to operate on the public highway is within the right of access to public accommodaton protected by the Maine Human Rights Act. An examination of the definition contained in 5 M.R.S.A. § 4553(8) (1979 & Pamph. 1987) reveals an obvious emphasis on some physical place

[5]The State challenges Jackson's use of the Maine Human Rights Act rather than the administrative Procedures Act provisions for judicial review, 5 M.R.S.A. §§ 11001-11008 (1979 & Pamph. 1987). The DECS regulation at issue would be subject to judicial review in any event. 5 M.R.S.A. § 8058(2) (1979).

or establishment offering goods, facilities or services to the general public. The Legislature defined a place of public accommodaton as "any establishment which in fact caters to, or offers its goods, facilties or services to, or solicits or accepts patronage from, the general public." It includes, but is not limited to, an extensive list of places such as inns, taverns, hotels, music halls, skating rinks, public libraries, public conveyances, public halls, and buildings occupied by two or more tenants. Id. Ordinarily, we would not consider a licensing, permitting or regulating function of government to be within that definition without a clear expression of such a legislative

purpose. We are even less inclined to so extend the meaning when, as noted above in the discussion of the Fair Practice Code, the Legislature has provided a clear and specific prohibition against such discrimination.

For similar reasons, we hold that the State was not guilty of employment discrimination in violation of the fair employment provisions of the Maine Human Rights Act. We agree with the Human Rights Commission that the prohibition against employment discrimination is not limited to employers, 5 M.R.S.A. § 4572(1)(A), employment agencies, § 4572(1)(B), and labor organizations, section 4572(1)(C). Nevertheless, we conclude that the Legislature did not

intend discrimination in state licensing or regulating to amount to employment discrimination. Such an interpretation of the statute would expose the state to liability under the Maine Human Rights Act for private employment wage loss without any clear indication of a legislative purpose to do so.

The Commission and Jackson argue for affirmance on the alternative ground of employment discrimination by citing a series of federal cases interpreting the

Federal Civil Rights Act.[6] Federal trial court opinions have suggested that the term "employer" as used in Title VII includes "any party who significantly affects access of any individual to employment opportunities." See, e.g., Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670 (D. Md. 1979); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D. N.H. 1974). These opinions involve an

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[6]The employment discrimination provisions of the Maine Human Rights Act are meant to be the state counterpart of the Civil Rights Act of 1964. We thus can look to federal cases interpreting equivalent provisions of the federal Act for guidance in interpreting the Maine Human Rights Act. Maine Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1261 (Me. 1979); Maine Human Rights Comm'n v. Local 1361, United Paperworkers International Union, 383 A.2d 369, 375 (Me. 1978).

interpretation of the Court of Appeals opinion in Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973).

Sibley involved the discriminatory practices of a private hospital that controlled a private nurse's access to patients, and thus employment. The court held that, in view of Title VII reference to control of employment opportunity by labor organizations and employment agencies as well as by employers, the plaintiff in Sibley was not precluded from establishing that the hospital, although not technically his employer, nonetheless interfered with his opportunity for employment and thus came within the statute. Id. at 1340-42. Sibley is factually distinguishable from

cases involving discrimination by virtue of a state's licensing or regulatory function. At least one court has criticized the Puntolillo Court for misconstruing Sibley by applying it to situations involving a state's licensing function. NOW v. Waterfront Comm'n of New York Harbor, 468 F. Supp. 317, 320-21 (S.D.N.Y. 1979). Regardless of the disputed federal interpretation of the Federal Civil Rights Act, and for the reasons stated above, we decline to expand the meaning of employment discrimination under the Maine Human Rights Act to the circumstances of this

case.[7]

Because MSAD No. 9 was Jackson's employer, the court concluded that it was liable to Jackson for employment discrimination. At the same time the court found that the district and its officials were "entirely blameless for the unfortunate chain of events that led to the loss of Mr. Jackson's job." The

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[7]Federal law "suggests no more binding impact than does any citation of persuasive decisions from foreign jurisdictions." Percy v. Allen, 449 A.2d 337, 342 (Me. 1982). Thus, while we look to federal law for guidance in determining whether the State has committed employment discrimination within the meaning of the MHRA, the Court must not abdicate its function of "conclusively resolving matters of purely state law." Id.

court's factual finding is inconsistent with its conclusion of liability. The district was precluded by virtue of 29 M.R.S.A. § 2013 from permitting Jackson to operate a school bus. We reject the court's attempt to retain MSAD No. 9 as a surrogate for the State.

We likewise reject the suggestion that the relief granted to Jackson can be affirmed on the ground that the Fair Practice Code incorporates all the remedies available under the Maine Human Rights Act. The Commission argues that the reference to Commission powers and duties contained in 5 M.R.S.A. § 789 (Supp. 1987) expresses such a legislative intent. Literally read, section 789 extends the Commission's powers and

duties only to affirmative action programs involving state employment opportunities.[8] We do not conclude that the literal interpretation leads to any absurd result. The Legislature might well have chosen to extend Commission enforcement to areas of equal opportunity in government employment without intending to confer similar powers in relation to other governmental action.

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[8]Section 789 provides,

All affirmative action programs, whether part of the civil service or not, shall be subject to the review and comment of the Human Rights Commission.

All powers and duties granted to the Maine Human Rights Commission under sections 4551, et seq., as amended, apply to this section. Complaints of discrimination based on race, color, religious creed, sex, national origin, age, physical handicap or mental handicap should be made to the Maine Human Rights Commission.

We detect no indication that the private remedies of the Maine Human Rights Act are applicable to discrimination in "any function or service to the public" provided by any agency of the state in violation of section 784. Without more definite legislative direction, we conclude that relief in the instant case is limited to judicial review pursuant to the Administrative Procedure Act and Rule 80C.

VI.

We next address the State's contention that the court improperly granted summary judgment for Jackson on his Rehabilitation Act claim. The Act provides, in pertinent part,

> No otherwise qualified individual with handicaps in the United States . . .

> shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794.

In order to establish a prima facie case under the Rehabilitation Act, Jackson must show: 1) that he is a "handicapped individual" within the meaning of the Act; 2) that he is "otherwise qualified" for the school bus driver position; 3) that he was excluded from the position solely because of his diabetic condition; and 4) the program or activity from which he was excluded receives federal funds. Strathie v.

Dept. of Transportaton, 716 F.2d 227, 230 (3d Cir. 1983). The State does not dispute the fact that Jackson is a "handicapped individual" whose application was denied solely because of his insulin-controlled diabetes. The State does, however, challenge the court's findings that the DECS is a program or activity receiving federal funds, and that Jackson is "otherwise qualified" for the position as a bus driver.

Despite some confusion in the record as to the use by DECS of federal funds and even greater confusion as to the applicable federal law, we conclude that the court correctly determined that there was no genuine issue of material

fact on the question of funding. The State contends that for liability to attach under the Rehabilitation Act, Jackson must establish that the discrimination occurred under a specific program that receives federal funds. We agree. We note the uncertainty as to just how specific the funding must be. See, e.g., Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 635-36 (1984); Disabled in Action v. Mayor & City Council of Baltimore, 685 F.2d 881, 884-84 (4th Cir. 1982); Brown v. Sibley, 650 F.2d 760, 767-70 (5th Cir. 1981). The facts in this case, however, fall well within any measure of specificity.

The parties have generated much evidence about, and focused much of their

arguments on, aspects of state and local (school district) funding that are totally irrelevant. In this regard, we are not concerned with the DMV licensing of bus drivers or with the MSAD No. 9 purchase or operation of school buses. The act of discrimination proscribed by the Rehabilitation Act consists of the inclusion of a requirement that school bus drivers be "free from . . . diabetes" in section 081.6(C)(3) of the Uniform School Bus Standards. Enforcement of that requirement falls within the distinct Division of Transportation of the DECS under the supervision of Associate Commissioner William F. Pagnano. Pagnano testified that the Transportation Division received

approximately $9,000 annually of federal funds for bus driver training. Contrary to the State's contention, those federal funds were not insulated by virtue of the fact that they were originally received by the Maine Highway Safety Committee. Cases on which the State relies are distinguishable.[9] We conclude that the federal funds received for bus driver

[9]Generally, the cases cited by the State hold that a program which indirectly benefits because of a different program's or activity's receipt of federal funds does not come within the Rehabilitation Act. See, e.g., U.S. Dept. of Transp. v. Paralyzed Veterans, 477 U.S. ___, 91 L.Ed. 2d 494 (1986) (airport's receipt of federal funds does not subject airline using airport to Rehabilitation Act); Disabled in Action v. Mayor & City Council of Baltimore, 685 F.2d 881, 884-85 (4th Cir. 1982) (baseball club's benefit from federal subsidy of stadium does not subject it to Rehabilitation Act.

training were sufficient to trigger the application of section 504 to the discriminatory aspect of the bus driver qualification regulations.

Moreover, we conclude that there is no merit in the State's contention that Jackson has not demonstrated that he is "otherwise qualified." The denial of Jackson's application was automatic and based solely on his diabetes. Jackson established that he had never missed work or been hospitalized because of his condition. The doctor who examined Jackson concluded that Jackson was free from any condition that might affect his ability to safely operate a school bus. The State offered no evidence that Jackson personally could not operate a

school bus safely. As we stated above, Jackson is now employed by MSAD No. 9 as a bus driver.

The remedy available to Jackson for the State's violation of the Rehabilitation Act presents a most difficult question. In Thiboutot v. State, 405 A.2d 230, 236-37 (Me. 1979) aff'd., 448 U.S. 1 (1980), we examined the question of the State's sovereign immunity under 42 U.S.C. § 1983. We stated "[t]hough the question is not free from doubt, it is our conclusion that, in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar . . . ." Id. at 237 (relying on Edelman v. Jordan, 415 U.S. 651 (1974)

and Quern v. Jordan, 440 U.S. 332 (1979)). We recognized that Edelman and Quern involved the Court's interpretation of the states' immunity from suit in federal courts under the Eleventh Amendment and that Quern may have been based on the meaning of the word "person" in section 1983. Thiboutot, 405 A.2d at 236. See Smith v. Dept. of Public Health, 410 N.W.2d 749, 754-70 (Mich. 1987); Edgar v. State, 595 P.2d 534 (Wash. 1979); cert. denied, 444 U.S. 1077 (1980). For reasons similar to those expressed in Thiboutot, and still without conviction that this federal issue has been finally resolved, we conclude that the State may constitutionally interpose its sovereign immunity in state court as

a bar to an award of damages under section 504 of the Rehabilitation Act. In Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) the Supreme Court resolved a conflict among the circuits by concluding that states and state agencies are not subject to suit in federal court for retroactive monetary relief under section 504 of the Rehabilitation Act. The Court's analysis was consistent with and relied in part upon Edelman and Quern. Atascadero, 473 U.S. at 243-47. We see no reason to depart from the conclusion we reached as to section 1983

in our Thiboutot decision.[10] We likewise find no merit in the trial court's novel theory that the "just compensaton" clause of our constitution, Me. Const., art I, § 21, justifies its award of damages against the State. Neither case cited by the court supports its conclusion.

The injunctive relief granted by the court is available only against the Secretary of State or the Commissioner of

[10]The code was amended in 1986 to allow suits against states in federal court for violations of the Rehabilitatio Act. 42 U.S.C. 2000 d-7(a)1) (Supp. 1988). It is by no means clear that the amendment abrogates sovereign immunity in state courts. In any event, the amendment applies only to Rehabilitation Act violations occurring after October 21, 1986, and thus has no effect on the instant case. 42 U.S.C. § 2000 d-7(b) (Supp. 1988)

DECS and not against the State of Maine. No issue has been raised on appeal, however, concerning the absence of those officials as parties and no useful purpose would be served by permitting amendment because, as we stated, Jackson has obtained his job as a result of the injunction. We conclude, however, that such relief was necessary because the State's attorney resisted any concession of error even after DECS liberalized its policy on diabetics. The injunction provided Jackson part of the relief that he sought and accomplished its purpose of securing to Jackson the opportunity he had been denied. Jackson's success in obtaining injunctive relief under section 504 authorizes the award of attorney fees

under the Act.[11] The amount of the fees awarded were within the sound exercise of judicial discretion. See Poussard v. Commercial Credit Plan, Inc. of Lewiston, 479 A.2d 881, 884 (Me. 1984).

The entry is:

Judgment against MSAD No. 9 vacated.

Judgment against the State of Maine vacated as it relates to damages and injunctive relief, affirmed as it relates to attorney fees.

All concurring.

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[11] Rehabilitation Act of 1973, 504, 29 U.S.C. § 794a(b) (1985) provides:

> In any action or proceeding to enforce or change a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.